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NO. 82-1796

IN THE  
**Supreme Court Of The United States**  
OCTOBER TERM, 1982

ROBERT E. SIMPSON,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO THE  
U. S. COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT — CRIMINAL CASE

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**BRIEF FOR PETITIONER**

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### **QUESTIONS PRESENTED**

1. WHERE AN ACCUSED IS TRIED UNDER AN INDICTMENT ALLEGING MULTIPLE INSTANCES OF PERJURY BEFORE A GRAND JURY, AND SOME OF THE ALLEGED INSTANCES ARE CLEARLY UNSUPPORTED BY SUFFICIENT PROOF TO JUSTIFY CONVICTION, IS HE DENIED A CONSTITUTIONAL RIGHT TO UNANIMOUS CONCURRENCE BY THE JURY, IT BEING IMPOSSIBLE TO DETERMINE WHETHER SUCH JURY CONVICTED ON INSUFFICIENTLY SUPPORTED ALLEGATIONS?

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**OPINION BELOW**

The opinion of the Court of Appeals appears in the Appendix. At the time of preparation of this petition, it was not included in any published advance sheet.

**JURISDICTION**

The judgment of the Court of Appeals was entered after denial of motion for rehearing, March 7, 1983. Jurisdiction of this petition is invoked under 28 USC Sec. 1254 (1).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .". (The remaining portion has no bearing on any issue involved and the requirement for unanimity in jury verdicts rests on the interpretation exemplified by *Apadoca v. Oregon*, 406 U.S. 404, 32 L.Ed. 2d 184.)

2. The statutes under which petitioner was convicted, although not challenged here, are 18 U.S.C. 1952, (the "Travel" Act) and 18 U.S.C. 1623, false declaration before a grand jury, which read:

### §18 U.S.C. 1952:

a. Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce with intent to:

(1) Distribute the proceeds of any unlawful activity, or

(3) Otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of any unlawful activity and thereafter performs or attempts to perform any of the acts specified, shall be guilty of an offense against the United States.

§1623. False declarations before grand jury or court

- a. Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USC §1746]) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.
- b. This section is applicable whether the conduct occurred within or without the United States.
- c. An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —
  - (1) each declaration was material to the point in question, and
  - (2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made

irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

- d. Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.
- e. Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

#### **STATEMENT OF THE CASE**

Petitioner was convicted under a two-count indictment, the first count charging interstate travel to promote bribery, the second charging false statements to a grand jury. He was sentenced to concurrent terms of 15 months on each count, together with a \$5,000 fine on each count.

The jury indictment contained four specifications of false statements, naming two former county judges who had been convicted of accepting bribes from petitioner, two who had not been convicted but asserted attempts had been made.

At trial, one of the former judges, who reported an unaccepted bribe attempt, after testifying on direct examination that a bribe attempt had been made, admitted on cross-examination that he would not characterize the incident as one involving a bribe attempt.

At the close of the evidence, petitioner's counsel moved that the jury be informed that it should not include in its deliberations the testimony of this witness, because his testimony admittedly fell far short of the necessary standard of proof of guilt beyond a reasonable doubt. It was pointed out that any verdict rendered without such caution would be open to question as lacking unanimity, the possibility of some jurors agreeing because convinced by the inadequate testimony being apparent. The trial court declined.

The Court of Appeals characterized the issues raised by appeal on this point as perhaps meritorious and "interesting", but affirmed because they felt the conviction under the "travel" count adequately supported.

**ARGUMENT**

Petitioner suggests that the Court of Appeals, by declining to pass on his contention that his conviction under the perjury count was tainted by the possibility of less than unanimous concurrence by the jury, has decided an important issue of constitutional law and apparently in conflict with recognized decisions by other circuits.

*United States v. Natelli*, 527 F.2d 311 (2nd Circuit, 1975) involves an identical situation, where multiple specifications were contained in a single count of an indictment and all submitted to the jury despite inadequate proof to sustain some of them. *Natelli* stands for the proposition that a conviction returned in such circumstances is ambiguous, — the jury may have found guilt on the unproved specification, and unanimity is open to substantial doubt.

A civil case, the rule of which is cited as applicable to criminal proceedings, is *United New York & New Jersey Sandy Hooks Pilots' Association v. Halecki*, (1959) 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed 2d 541. It holds that unproven allegations must be withdrawn from jury consideration.

While Rule 7(c) clearly sanctions inclusion of more than one specification in a single indictment, it just as clearly does not contemplate that unproven specifications must be withdrawn from jury consideration on timely request, which was done here, reliance being placed on *Natelli* specifically.

We submit that the district court's refusal to follow the correct procedure, coupled with the refusal of the Court of

Appeals to consider the same issue, effectively deprived petitioner of a right secured by the Sixth Amendment guaranteeing trial by jury and a unanimous verdict. The issue is likewise one of importance. Denial of a constitutional right can never be regarded as a matter lacking in importance.

Respectfully submitted,

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(501) 376-6291

*For Petitioner*

## **APPENDICES**

### **APPENDIX "A"**

#### **UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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**NO. 82-1855**

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UNITED STATES OF AMERICA ..... *Appellee*  
v.  
ROBERT E. SIMPSON ..... *Appellant*

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#### **APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS**

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Submitted: January 12, 1983  
Filed: February 11, 1983

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Before ROSS, Circuit Judge, HENLEY, Senior Circuit Judge, and FAGG, Circuit Judge.

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**PER CURIAM.**

Appellant Robert E. Simpson was convicted of perjury and travel in interstate commerce to promote bribery. He appeals his conviction on the perjury count, which was

based on Simpson's testimony before a grand jury investigating kickbacks to Arkansas county judges. In his testimony he denied offering to pay a bribe to Judges Bishop and McCuen, or paying a bribe to Judges Parker and McLeskey. His testimony was incorporated in the indictment.

At Simpson's jury trial, all four judges were called to testify about their conversations and dealings with Simpson. Simpson concedes that the testimony of either McLeskey or Parker that Simpson had paid each kickbacks was sufficient to support a finding that Simpson had lied to the grand jury. However, he argues that the testimony of Bishop and McCuen was insufficient to support a guilty verdict. Because the general verdict is not clear as to which specification the jury believed, Simpson contends that the jury might have convicted him on McCuen's or Bishop's testimony; to prevent a conviction possibly based on insufficient evidence, the conviction should be reversed. Simpson further argues that the district court<sup>1</sup> erred in not giving an instruction specifically directing that the jurors be unanimous as to which specification, if any, Simpson was guilty.<sup>2</sup>

While as a general proposition, Simpson's arguments may have some merit,<sup>3</sup> we need not reach the interesting

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<sup>1</sup>The Honorable Henry Woods, United States District Judge, Eastern District of Arkansas.

<sup>2</sup>The jury received a general unanimity instruction similar to that recommended in 1 Devitt and Blackmar, **Federal Jury Practice and Instructions** §18.01 (1977).

<sup>3</sup>Simpson relies on **United States v. Natelli**, 527 F.2d 311 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976), for the proposition that a guilty verdict which might be based on a specification inadequately supported by the evidence is ambiguous and cannot stand. He argues that when an ambiguous verdict is rendered, the jury may have

(continued on next page)

issues they raise or suggest. Here, Simpson was convicted of traveling in interstate commerce to promote bribery, in addition to the perjury count. The travel conviction was based on Simpson's bribery only of Judge Parker. This conviction removes any ambiguity in his perjury conviction, since it shows that the jury verdict was in fact based on a specification adequately supported by the evidence, and that the jury was unanimous on Simpson's guilt of that specification. See *United States v. Tresvant*, 677 F.2d 1018, 1024 (4th Cir. 1982) (Phillips, J., concurring); *United States v. Ballard*, 663 F.2d 534, 544 (5th Cir. 1981), modified on other grounds, 680 F.2d 352 (1982); *United States v. Sutherland*, 656 F.2d 1181, 1202 (5th Cir. 1981); *United States v. Murray*, 618 F.2d 892, 898 (2d Cir. 1980).

The conviction is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,  
EIGHTH CIRCUIT.

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found the defendant guilty of the unproven specification and not guilty of the proven specification. Thus, Simpson contends that he may have been convicted upon proof which does not reach the level of beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); see *Yates v. United States*, 354 U.S. 298 (1957).

Simpson's second argument is that the jury may not have been unanimous. *Johnson v. Louisiana*, 406 U.S. 356 (1972). He argues that the court should have given a specific instruction directing unanimity on the specification of which Simpson was guilty. This would protect against the possibility of his conviction if, for example, half the jurors believed he bribed Parker but not that he attempted to bribe Bishop and the other half believed he attempted to bribe Bishop but not that he bribed Parker. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977).

**APPENDIX "B"**

**IN THE UNITED STATES DISTRICT COURT FOR  
EASTERN DISTRICT OF ARKANSAS**

**FILED: JULY 12, 1982**

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**Docket No. LR-CR-82-32**

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**UNITED STATES OF AMERICA,**

*Plaintiff,*

VS.

**ROBERT E. SIMPSON,**

*Defendant.*

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**JUDGMENT AND PROBATION/COMMITMENT ORDER**

In the presence of the attorney for the government the defendant appeared in person on this date: July 12, 1982.

**COUNSEL**

Griffin Smith (employed) as counsel for Defendant.

**PLEA**

There being a verdict of GUILTY. Cts. I and II.

**FINDING AND JUDGMENT**

Defendant has been convicted as charged of the offense(s) of travel in interstate commerce to promote bribery, in violation of Title 18 United States Code, Section 1952 and perjury, in violation of Title 18 United States Code, Section 1623.

**SENTENCE OR PROBATION ORDER**

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Fifteen (15) Months and fined the sum of \$5,000.00 on Count I and Fifteen (15) Months imprisonment on Count II, said period of imprisonment on Count II to run concurrently to sentence imposed in Count I.

The defendant is Ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

The Court recommends that defendant be placed in the Springfield Medical Center for federal prisoners for service on the sentence imposed herein or until such time he is determined to no longer need medical treatment or supervision at Springfield Medical Center.

**SPECIAL CONDITIONS OF PROBATION**

Upon the filing of Notice of Appeal, the Defendant shall be released on his own personal recognizance bond pending the determination of the appeal by the Eighth Circuit Court of Appeals.

/s/ Henry Woods,  
U.S. District Judge

Certified as a true copy this date: 7-12-82

By: /s/ Deputy Clerk

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**APPENDIX "C"**

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

**FILED MARCH 7, 1983**

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**NO. 82-1855**

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**September Term, 1982**

**UNITED STATES OF AMERICA .....** *Appellee*

**v.**

**ROBERT E. SIMPSON .....** *Appellant*

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**APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF ARKANSAS**

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Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 7, 1983